



Digital Progress Institute

July 24, 2023

Via ULS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Re: *ULS Application File Numbers – 0010475575 & 0010206629*

Dear Ms. Dortch,

I submit my article in the Federalist Society—attached in this Exhibit A—for the record in the above-referenced proceeding.

Thank you in advance for the Commission's time and consideration of it.

Respectfully submitted,

Joel L. Thayer
President & Member of the Board

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CERTIFICATE OF SERVICE

On July 24, 2023, I hereby certify that a copy of this letter was served upon the following persons via email:

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EXHIBIT A

Jul
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Can the FCC Take T-Mobile's Money and Run?

Topics: Administrative Law & Regulation · Telecommunications & Electronic Media
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NEWS

A fascinating legal debate has the telecom sector in a stir. The topic? What the lapse of the Federal Communications Commission's spectrum auction authority means for pending applications for spectrum licenses.

On one side, you have T-Mobile. It won 7,156 spectrum licenses last December from the 2.5 GHz spectrum auction—the last auction envisioned in the FCC's 5G Fast Plan. T-Mobile outbid several wireless carriers and paid the FCC \$304 million almost a year ago. T-Mobile believes that it is entitled to use these licenses—which it bought and paid for—or at least get a temporary license (called a special temporary authorization or STA) while the agency sorts out granting permanent licenses.

On the other side is the FCC. The Commission says it cannot grant T-Mobile's licenses. The reason? According to the FCC's press secretary, it can't grant the license because "[t]he authority of the Commission to grant a license or permit under [section 309(j) of the Communications Act] . . . expire[d] March 9, 2023." And it can't even grant an STA because "any special temporary authority the FCC could have would flow from this section of the statute, which . . . is still currently expired."

So who is right?

The FCC's Authority to Grant Spectrum Licenses

On the face of the statute the FCC cites, it has a strong case. Section 309(j)(11) states that "[t]he authority of the Commission to grant a license or permit under this [Section 309(j)] shall expire March 9, 2023." The text seems pretty clear that the FCC cannot grant a license under 309(j) now that that deadline has passed.

However, Section 309(j) is not the only authority the FCC has to grant licenses. The Commission traditionally uses Section 307(a) when granting spectrum licenses, not Section 309(j). Section 307(a) directs the FCC to grant "a station license" so long as it serves the "public convenience, interest, or necessity." It's this statutory provision, not 309(j), that the FCC has relied on again and again to issue licenses—including practically every auctioned spectrum license to further its 5G Fast Plan, which includes the 2.5 GHz band.

Or consider Section 309(a), which a bipartisan group of former FCC general counsels points out gives the FCC similarly broad authority. Section 309(a) says the Commission "shall grant" spectrum licenses that serve the "public interest, convenience, and necessity."

But wait, there's more.

There's a funny quirk with how the FCC has implemented Section 309(j), the authority it has cited. That entire subsection—and the Commission's ability to hold auctions—only applies when there are applications that are "mutually exclusive" of one another. The Commission considers two or more pending applications mutually exclusive "if the grant of one application would effectively preclude the grant of one or more of the others under Commission rules governing the Public Mobile Services involved." To ensure mutual exclusivity in an auction (and ensure the FCC in fact has legal

authority to run an auction), the FCC uses a two-step process: It sets a low bar for entry (the short-form application) to encourage participation, and then it requires the winning bidder to submit another application for the individual licenses it has won (the long-form application).

Before the 2.5 GHz auction, T-Mobile submitted a short-form application, as did many other bidders. But for the licenses that T-Mobile won, it is the only wireless carrier that has submitted a long-form application. In short, T-Mobile is now the only applicant for those licenses—and there's no other use of this spectrum that granting these licenses would preclude. In short, T-Mobile's applications are not mutually exclusive. Hence, it's unclear whether the FCC could even grant T-Mobile applications under Section 309(j)—one reason why the FCC routinely relies on other provisions to grant auction-won licenses—and by extension, it appears the lapse of auction authority under that section is immaterial.

For the same reason, the prefatory clause of Section 309(a)—which gives the FCC licensing authority “subject to the provisions of this section” (i.e., the limits contained in 309(j))—should not be a barrier to licensing. If there are no “mutually exclusive” long-form applications for these licenses, it appears that Section 309(j) does not apply and thus the FCC may grant T-Mobile's licenses irrespective of the status of its auction authority.

The Lottery Precedent

Of course, no analysis of the law would be complete without a look at precedent. And when the Commission confronted a similar situation more than two decades ago, it granted the licenses.

Before the FCC had auction authority, it had lottery authority: Section 309(i) required the FCC to resolve mutually exclusive applications by lottery. One company, Zephyr Communications, won a license via spectrum lottery, but the FCC failed to grant the license before Congress intervened and ended the Commission's lottery authority on July 1, 1997 (at least for commercial licenses). Thereafter, the Commission granted Zephyr its licenses, much to the consternation of Ranger Cellular, another provider that lost the lottery. And so in 1999, Ranger challenged the grant, arguing that it violated Section 309(i)(5), which prohibited the FCC from issuing licenses through the use of lotteries after July 1, 1997.

Sound familiar? It should, because this is the precise situation the FCC finds itself in with respect to T-Mobile's licenses.

Here's how the Commission handled it. The FCC denied Ranger's petition in a Report and Order where it clarified that “Section 309(i)(5) only prevents the Commission from conducting new lotteries after July 1, 1997 . . . it does not prohibit the Commission from processing an application based on the results of a lottery that occurred prior to that date.” In other words, the FCC argued that it could use other authorities to grant Zephyr's licenses and was not relegated to the portion that restricted it from issuing licenses via a lottery. Ranger Cellular sued the FCC in the D.C. Circuit. And the court ultimately dismissed the case.

This precedent is important to note for a few reasons. The statutory language Ranger cited from Section 309(i)(5) (barring the FCC from granting licenses under a lottery system) mirrors the language barring the Commission from granting licenses through an auction. Zephyr won the lottery—and the right to file a long-form application—while the Commission's lottery authority existed. Similarly, T-Mobile won the auction—and the right to file a long-form application—while the Commission's auction authority existed. The Commission found that it retained authority to grant Zephyr's license, so it seems that the FCC would be on good legal footing for granting T-Mobile's licenses.

The FCC's Authority to Grant Temporary Licenses

But let's say that it's a close question, and the FCC has good reasons to hesitate in granting a permanent license. What then?

Well, that leaves the question of granting T-Mobile's application for a temporary license. Turns out there's a statutory provision for that: Section 309(f) expressly grants the FCC authority to “grant a temporary authorization” while an application for a permanent license is pending. So again, the FCC would not need to rely on the expired authority in 309(j) to grant a temporary license; it could instead rely on an entirely different subsection without an expiration date.

Like its authority to grant permanent licenses, the FCC's STA authority stems from multiple statutory provisions. Sections 309(c)(2)(C) and 309(c)(2)(G) expressly contemplate “temporary” authorizations, and Section 307(c)(1) gives the FCC rulemaking authority to create licenses of different terms, including temporary licenses. The Commission has relied on numerous sections of the Communications Act when using its STA authority. And it has continued to exercise its STA authority despite the expiration of its auction authority, issuing nearly 400 temporary licenses since March 10, 2023.

What's more, the FCC's STA authority long predates its auction authority. This fact makes it even more difficult for the FCC to assert its STA authority is at all tethered to its auction authority. The fact that its auction authority expired should not impact its STA authority at all. It's hard to square the circle here on how these otherwise distinct authorities could impact one another.

* * *

It's fair to say that the FCC's license-granting authority is messy. But the lapse of auction authority did not end the Commission's licensing authority writ large—far from it. The FCC has a wide breadth of authority that it can rely on and solid agency precedent that it can leverage to grant T-Mobile either temporary or permanent licenses.

But this all raises the question: Let's say that the FCC cannot grant T-Mobile's applications at all given the lapse in Section 309(j) auction authority. If that's the case, what's the authority that allows the FCC to keep T-Mobile's \$304 million? Despite scouring the Communications Act, I cannot find one. And at least in the statements I've seen from the FCC, it doesn't appear that its lawyers have had any more success.

Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.



Joel Thayer